Supreme Court, U.S.
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No. 94-_____

In the Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF CORVALLIS,

Petitioner,

V.

JENNIFER C. TURPEN AND
DONALD LEE THOMAS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WITH APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Is a tenant, who is unknown to exist to a City, who does not have a property interest in the continued supply of water from the City, who does not have the right to seek an injunction against the City, and who is not in privity of contract with the City, nevertheless entitled to due process from the City under the Due Process Clause of the Fourteenth Amendment, prior to the City turning off the water to the apartment complex for the landlord's nonpayment of the water bill, for the reason that the tenant has the statutory right under state law to apply for an injunction against his landlord, **after** his landlord fails to provide a water supply to the tenant's apartment or after the landlord willfully causes the interruption of running water to the tenant's apartment?

2. Is a statutory right to apply for an injunction by a tenant against his landlord, that arises only **after** the landlord causes the termination of water to the tenant's apartment, a property interest as that term is used in the Due Process Clause of the Fourteenth Amendment?

3. If a statutory right to apply for an injunction by a tenant against his landlord **after** the landlord causes the termination of water to the tenant's apartment is a property interest, is there a deprivation of that property interest by a City, when the City notifies the landlord, but does not notify the tenant, that water to the apartment complex is going to be turned off for the nonpayment of the water bill by the landlord. That is, can there be a deprivation of a property interest (the right to apply for an injunction) prior to the existence of the

property interest (the right to the injunction does not arise until the landlord causes the termination of the water)?

4. Did the Ninth Circuit err in holding that a tenant's post-deprivation statutory right to apply for an injunction against his landlord created a predeprivation obligation of a City to provide notice to the tenant that the water to the apartment complex was going to be turned off for the non-payment of the water bill by the landlord, in light of the holding of the Ninth Circuit that the tenant did not have a property interest in the continued supply of water from the City?

5. If there was a property interest and deprivation of that property interest in the case at bar, did the Ninth Circuit err in holding that the tenant's post-deprivation rights to seek an injunction and monetary relief from his landlord were insufficient due process, in light of the following factors: (1) the tenant was unknown to the City; (2) requiring notice to be provided to the tenant would have also required the City to have continued to supply free water to the apartment complex until the tenant could obtain his injunction; (3) requiring notice to be provided to the tenant would have postponed the turning off the water, until the tenant had the time to hire an attorney, file his injunction, and obtain a court ruling ordering the landlord to pay his water bill so that the water would not be turned off; and (4) providing due process to the tenant results in the tenant receiving greater due process than the landlord, when the landlord had a property interest in continued water from the City and the tenant did not, since the due process

required to be provided to the landlord did not include a judicial proceeding?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the City of Corvallis, respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Ninth Circuit in the above-entitled case; and rev[illegible] the decision of the Ninth Circuit, and remand the matter for the entry of a judgment in favor of petitioner.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this matter is reported as *Turpen v. City of Corvallis*, 26 F.3d 978, (9th Cir. 1994), and is set forth as Appendix A in this petition.

In its opinion and ensuing judgment, the Court of Appeals for the Ninth Circuit affirmed the judgment of the United States District Court for the District of Oregon, which had granted respondents' (then plaintiffs) motion for summary judgment, on the basis that the respondents had been denied due process of law in violation of the Fourteenth Amendment in that they were not provided with notice of the petitioner's intent to turn off the water to the apartment complex in which they were residing because of their landlord's failure to pay the water bill the landlord owed to the petitioner.

The Court of Appeals also affirmed the district court's finding that the respondents did not have a Fourteenth Amendment property right or interest to continuous water service from the petitioner; and thus, the respondents were not entitled to due process of law on that basis. The unreported opinion of the district court is set forth as Appendix B in this petition.

JURISDICTION

Jurisdiction to review the Court of Appeals' judgment and opinion by writ of certiorari in this civil case is conferred upon this Court by 28 U.S.C. § 1254(1). The opinion of the United States Court of Appeals for the Ninth Circuit was filed on June 17, 1994, and the judgment sought to be reviewed was entered on the same date.

This petition for a writ of certiorari is being filed within the 90-day period prescribed by 28 U.S.C. § 2101(c) and Rule 13 of the Court, as computed in accordance with Rule 30 of the Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved in this case is Section 1. of the Fourteenth Amendment to the United States Constitution. The federal statute authorizing civil actions for the deprivation of civil rights is 42 U.S.C. § 1983.

Section 1. of the Fourteenth Amendment to the United States Constitution provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

1. Basis of Jurisdiction in the Lower Courts.

The basis for federal jurisdiction in the United States District Court for the District of Oregon over plaintiffs' claims is 28 U.S.C. §§ 1331 and 1343(3). The basis for jurisdiction in the Court of Appeals for the Ninth Circuit is 28 U.S.C. §1291.

2. Summary of Material Facts.

On February 24, 1990, Plaintiff Donald Lee Thomas entered into a written rental agreement with Don Heilesen for the rental of a two-bedroom apartment (Apt. No. 2) in the Valley Villa Apartments, an apartment complex located at 978 N.W. Cleveland, Corvallis, Oregon. (ER at 36) The written rental agreement was signed by Donald Thomas as Lessee, and Don Heilesen as Lessor. The agreement also listed Jennifer Turpen as Lessee; but Ms. Turpen never signed the agreement, or otherwise obligated herself to pay the rent. (ER at 36)

The rental agreement provided in paragraphs 8 and 9, in part, as follows:

8. Lessor shall supply electric wiring, plumbing facilities which produce hot and cold running, safe drinking water and adequate heating facilities;

9. Lessor shall pay for all natural gas, electricity, and telephone service. All other services will be paid for by Lessor and Lessee as follows:

	Lessee	Lessor
Water	☐	☒

At the time of entering into the rental agreement with the plaintiffs, Mr. Heilesen was the subscriber for water service for the Valley Villa Apartments and water service was in his name. (Plaintiffs' First Request for Admissions at 3, CR at 11) Mr. Heilesen had agreed directly with the City to pay for the water service. (Affidavit of Mark Larson at 3-4, ER 39-40)

In the City of Corvallis, there are no restrictions as to whom can become a subscriber to water service. (Affidavit of Mark Larson at 2, ER 38) Any person desiring water service in their own name only needs to fill out and sign a form requesting water service. (Affidavit of Mark Larson at 3, ER 39) This means that any occupant of any apartment in the City of Corvallis can become a subscriber to water service, in their own name, if he or she agrees to pay for the water provided by the City. (Affidavit of Mark Larson at 3, ER 39) When this occurs, the apartment is metered separately from the other apartments, and the bill is sent directly to the tenant that has agreed to be the subscriber. (Affidavit of Mark Larson at 3, ER 39)

When a tenant wishes to be a direct subscriber, there is no requirement that the tenant be the owner of the apartment or

apartment complex. (Affidavit of Mark Larson at 3, ER 39) Furthermore, there is no requirement that the owner of the apartment building agree to allow the tenant to be the subscriber; nor is there any requirement that the owner of the apartment building agree to be responsible for the water bill, if the tenant does not pay. (Affidavit of Mark Larson at 3, ER 39) The City deals directly with the tenant that is the subscriber, and no one else. (Affidavit of Mark Larson at 3, ER 39)

At no time did Ms. Turpen or Mr. Thomas ever request to become subscribers to water service provided by the City in their own names, nor did they ever agree in any manner to be responsible to the City for the payment of water to their apartment. (Affidavit of Mark Larson at 3, ER 39) In addition, at no time was the City of Corvallis provided the names of any of the tenants in the apartment building, and the City did not know if all, or just some of the apartments were rented. (Affidavit of Mark Larson at 2, ER 38)

During the period of time the plaintiffs resided in the Valley Villa Apartments, on two occasions, Mr. Heilesen failed to pay the water bill he owed to the City; and as a result, the City turned off the water to the Valley Villa Apartments. (Affidavit of Mark Larson at 4, ER 40) Specifically, the water was turned off on April 5, 1990, from 1:00 p.m. to 5:00 p.m., and on October 31, 1990, from 1:00 p.m. to 5:00 p.m. (Agreed Facts, Pretrial Order at 2, ER at 29)

Prior to the two times the water was turned off, on each occasion, Mr. Heilesen was provided two notices that his

water was going to be turned off for the lack of payment of the water service. (Affidavit of Mark Larson at 2, ER 32)

The first notice given to Mr. Heilesen on each occasion was given to him at least 35 days before the actual date the water was turned off. (Affidavit of Mark Larson at 2, ER 32) In addition, the first notice expressly informed Mr. Heilesen of the date the water would be turned off, if he did not pay his water bill. (Affidavit of Mark Larson at 2, ER 32) Also, the first notice on each occasion advised Mr. Heilesen that if he desired, he would be provided a hearing before Mark Larson, the Finance Director of the City of Corvallis, or another City staff employee to address any issues concerning his water bill. (Affidavit of Mark Larson at 2, ER 32) If Mr. Heilesen had notified the City of financial hardship problems, the City had the discretion of allowing water service to continue at his apartments, upon acceptance of a valid plan for the payment of the water bill in installments. (Affidavit of Mark Larson at 2, ER 32)

The water service to the Valley Villa Apartments was terminated because Mr. Heilesen did not pay his water bill; the water service was not terminated to force Ms. Turpen or Mr. Thomas out of their apartment, nor was the water turned of in an effort to assist Mr. Heilesen in evicting Ms. Turpen or Mr. Thomas. (Affidavit of Mark Larson at 4, ER 40)

After the plaintiffs moved out of the Valley Villa Apartments, Mr. Thomas filed a lawsuit against Mr. Heilesen, seeking damages for the two times the water to the plaintiffs' apartment was shut off. (Defendant's Motion for Summary Judgment, Exhibit 101 at 1, CR 15) On July 24, 1991, Mr.

Thomas obtained a judgment against Mr. Heilesen. (Defendant's Motion for Summary Judgment, Exhibit 101 at 4, CR 15)

3. Procedural History.

The plaintiffs, Jennifer C. Turpen and Donald Lee Thomas, past residents of the Valley Villa Apartments, filed this action to recover money damages under 42 U.S.C. § 1983 from the City of Corvallis, Oregon, as a result of the termination of water service to the Valley Villa Apartments on April 5, 1990, from 1:00 p.m. to 5:00 p.m., and on October 31, 1990, from 1:00 p.m. to 5:00 p.m., the water having been turned off on those dates because of the nonpayment of the water bill by Mr. Don Heilesen, the landlord and owner of the Valley Villa Apartments. At the time of each water turn-off, the plaintiffs were not in privity of contract with the City of Corvallis for water service, nor were the plaintiffs otherwise obligated to the City to pay for water service. The only party that had agreed to pay for the water service was Mr. Heilesen, who had been provided prior notice by the City that the water to his apartments was going to be turned off because of his nonpayment of the water bill.

In their complaint, the plaintiffs contended that the actions of the City of Corvallis violated the rights afforded to them by the Fourteenth Amendment to the United States Constitution as follows:

> ". . . [t]he City of Corvallis, without warning, shut off the water service to the multi-unit apartment building where they live. Under the City's water termination policy, tenants can lose water service without any prior notice whatsoever simply because their landlords have not paid the water bill.

> Plaintiffs contend that the City's failure to give adequate notice of water service disconnections violates the due process clause of the fourteenth amendment to the United States Constitution. . . ." (Plaintiffs' complaint at 1-2, ER at 16-17)

> "Plaintiffs had and continue to have property rights arising under state law, the Corvallis City Ordinances, their rental agreement, and the Oregon Residential Landlord and Tenant Act which entitle them to uninterrupted water service and the right to enforce their statutory rights as tenants in state court to prevent a water shut off.
>
> The City deprived plaintiffs of their property rights described above by terminating their water service." (Plaintiffs' complaint at 4, ER at 19)

In response to the plaintiffs' complaint, the City of Corvallis filed its answer denying that it had deprived the plaintiffs of any property interest as that term is used in the Fourteenth Amendment. Then, because none of the facts in this matter were in dispute, both the plaintiffs and the City moved for summary judgment on the issue of liability.

The Honorable Robert E. Jones, as the trial court judge, granted the plaintiffs' motion for summary judgment, and denied the defendant's motion. In granting the plaintiffs' motion, the trial court agreed with the defendant that the plaintiffs did not have a Fourteenth Amendment property interest in continued water service from the City:

> "Plaintiffs submit that Oregon law provides them with a property interest in the continued supply of water. . . ." (Opinion and Order of J. Jones at 6, ER at 8)

> "Nothing proffered by plaintiffs demonstrates a broad entitlement to a continued water supply." (Opinion and Order of J. Jones at 9, ER at 11)

However, after finding that the plaintiffs did not have a property interest in continued water service, the trial court nevertheless held that the plaintiffs were entitled to prevail because the plaintiffs' right to enjoin their landlord under Oregon's Residential Landlord and Tenant Act constituted a constitutionally protected property interest which was taken from the plaintiffs by the City, when the City terminated the water service to the Valley Villa Apartments, without first giving the plaintiffs notice that the water to the apartments was going to be shut off. As stated by the trial court:

> "Oregon has a landlord-tenant act that provides plaintiffs, such as plaintiffs in the present case, with a cause of action against landlords who disrupt the tenants' water supply. 'A landlord shall at all times during the tenancy maintain the dwelling unit in a habitable condition.' ORS 90.320 (1). A dwelling unit is uninhabitable if the unit 'substantially lacks' a water supply. Id. '[T]he tenant may recover damages and obtain injunctive relief for any noncompliance by the landlord with the rental agreement or' if the landlord fails to keep the dwelling unit in a habitable condition. ORS 90.360(2) (emphasis added). The plaintiffs in the present case had a right to apply for an injunction for two reasons: 1) the premises became uninhabitable because the premises substantially lacked a water supply in good working order to the extent controlled by the landlord; and 2) the landlord was not complying with the rental agreement.
>
> A further remedy in the Oregon landlord-tenant act is found at ORS 90.375.
>
> > 'If a landlord . . . wilfully diminishes services to the tenant by interrupting or causing the interruption of . . . running water . . . the tenant may obtain injunctive relief to recover

> possession or may terminate the rental agreement and recover an amount up to two months' periodic rent or twice the actual damages sustained by the tenant, whichever is greater.'

90.360(2).

. . . Plaintiffs correctly submit that they have a due process right to seek an injunction under ORS 90.360(2).

There are two plaintiffs in this action: Jennifer Turpen and Donald Thomas. Only Donald Thomas signed the lease, however, Jennifer Turpen is listed on the rental agreement as a tenant. Under the definition of 'tenant' Donald Thomas and Jennifer Turpen are tenants. ORS 90.100(13) ('Tenant' means a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others . . . .'). Both are entitled to exercise the rights described above. Both possess a due process right under ORS 90.360(2) ('[T]he tenant may recover damages and obtain injunctive relief . . . .')." (Opinion and Order of J. Jones at 4-6, ER 6-8)

". . . The essence of this case is that because a state statute provides that landlords must provide a water supply or be faced with an injunction, a protected interest, no entity may take away a tenant's legal right and entitlement to get an injunction prohibiting the landlord from taking away the tenant's water supply. Simply, leaving the tenant with the option to, after the fact, receive compensation is not enough.

The fact that the landlord, Mr. Heilesen, contracted to pay for plaintiffs' water is not dispositive. See ORS 90.320(1) (C) (A) - (D) (detailing various ways water supply may run counter to the landlord-tenant act).

It is not the deprivation of water itself that gives rise to this action, it is the deprivation of plaintiffs'

> statutory right to get an injunction. . . ." (Opinion and Order of J. Jones at 10, ER 12)

After the trial court granted the plaintiffs' motion for summary judgment, the parties stipulated to the amount of the judgment to be entered against the City, and a final judgment was entered against the City. The City then appealed the judgment to the Ninth Circuit Court of Appeals.

On appeal, it was the City's position that the plaintiffs' motion for summary judgment should have been denied, and that the City's motion for summary judgment should have been granted for the following reasons.

First, a tenant's statutory right under state law to apply for an injunction against his landlord that arises after a deprivation of water service by the landlord cannot, by itself, constitute a property interest entitling the tenant to due process prior to the water being shut off by the City supplying water to the landlord, because the right to apply for the injunction comes after the deprivation; and because the tenant is unknown to exist to the City, the tenant does not have a property interest in the continued supply of water from the City, the tenant does not have the right to seek an injunction against the City, and the tenant is not in privity of contract with the City.

Second, the City of Corvallis never deprived the plaintiffs of their statutory right to apply for an injunction against their landlord; the City never deprived the plaintiffs of their right to obtain an injunction against their landlord; and the City never deprived the plaintiffs of their right to obtain damages from their landlord. Simply stated, the City didn't do anything to deprive the plaintiffs of seeking recourse in state court against their landlord.

And finally, even if there was a property interest and deprivation of that property interest in the case at bar, the tenant's post-deprivation statutory rights under Oregon Law to seek an injunction and monetary relief from their landlord was all the due process they were entitled, because a meaningful method of providing due process to them was not practical in light of the following factors: (1) the plaintiffs were unknown to the City; (2) requiring notice to be provided to the plaintiffs would have also required the City to have continued to supply free water to the apartment complex, until the plaintiffs could have obtained their injunction; (3) requiring notice to be provided to the plaintiffs would have postponed the turning off the water, until the plaintiffs had the time to hire an attorney, file their injunction, and obtain a court ruling ordering their landlord to pay his water bill so that the water would not be turned off; (4) providing due process to the plaintiffs would have resulted in them receiving greater due process than the City was required to give to their landlord, when the landlord did have a property interest in continued water from the City and the plaintiffs did not, since the due process required to have been provided to the landlord did not include a judicial proceeding, and (5) requiring due process in the case at bar would result in the overwhelming task of requiring a municipality to give notice to all unknown third persons not in privity of contract with the municipality, in every situation where such a third person had the right to seek an injunction against the person in privity of contract with the municipality.

The Ninth Circuit Court of Appeals affirmed the trial court's finding that the plaintiffs did not have a property right

or interest to continuous water service from the City, finding that the issue had not been properly presented to it because the plaintiffs did not cross-appeal.

The Ninth Circuit Court of Appeals also affirmed the trial court's finding that the plaintiffs' right to apply for an injunction against their landlord amounted to a property interest protected by the Due Process Clause of the Fourteenth Amendment; and that the plaintiffs' were deprived of their right to apply for an injunction against their landlord, because the City of Corvallis did not provide them with notice and an opportunity to seek an injunction against their landlord prior to terminating the water service to the apartment complex.

In so holding, the Ninth Circuit found that a post-deprivation statutory right to apply for an injunction created a predeprivation right to due process, because the right to apply for the injunction was a cause of action that constituted a property interest recognized by this Court in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

As to what due process was due, the Ninth Circuit held that the plaintiffs' post-deprivation statutory rights under Oregon Law to seek an injunction and monetary relief from their landlord was insufficient, because the City had a meaningful method of providing due process to the plaintiffs, since the City had the address of the apartment complex.

REASONS FOR GRANTING THE WRIT

1. There is a Conflict between Circuits.

Three Circuits, including the Ninth Circuit in the case at bar, have considered the issue whether a tenant is entitled to due process. *DiMassimo v. City of Clearwater, et. al*, 805 F.2d 1536 (11th Cir. 1986); *Sterling v. Village of Maywood, et. al*, 579 F.2d 1350 (7th Cir. 1978); *Cert. denied,* 440 U.S. 913, 99 S.Ct. 1227, 59 L.Ed.2d 462 (1979).

The decision in the case at bar by the Ninth Circuit is in direct conflict with the Seventh Circuit's decision in *Sterling v. Village of Maywood, et. al*, 579 F.2d 1350 (7th Cir 1978); *Cert. denied,* 440 U.S. 913, 99 S.Ct. 1227, 59 L.Ed.2d 462 (1979). Since this Court denied certiorari in *Sterling*, impliedly speaking, this Court deems the Seventh Circuit's decision correct; thus, the case at bar should now be reversed.

In *Sterling*, the plaintiff-tenant entered into an oral lease agreement with her landlord for the rent of a single family dwelling unit in the Village of Maywood, Illinois. The plaintiff contended that there was an understanding between her and the landlord that the landlord would pay for the water service to the home out of the monthly rental payment. A dispute then arose between the plaintiff and the landlord, and the landlord, in order to get the plaintiff out of the home, requested the Village of Maywood to terminate the water service to the home. Since the landlord was the only one responsible for paying the water bill, the Village terminated the water service as requested.

The Court of Appeals for the Seventh Circuit, in finding that the Village did not violate the due process rights of the

plaintiff in terminating her water service without prior notice to her, stated as follows:

> "Plaintiff's first argument is that the defendants violated her due process rights when they terminated her water service without prior notice and an opportunity for some type of a "hearing." Plaintiff reasons that, although a municipality is under no obligation to provide water service, once its chooses to do so "a user has a legitimate claim of entitlement to continue service absent sufficient cause for termination . . . ." *Koger v. Guarino*, 412 F.Supp. 1375, 1386 (E.D.Pa.1976), *Aff'd* without opinion, 549 F.2d 795 (3d Cir. 1977).
>
> In evaluating the merits of plaintiff's contention, our concern must be with whether some basis exists for concluding that plaintiff's role as a tenant-water user creates a constitutionally protected property interest in continued water service. To resolve that issue, we must rely on the Supreme Court's analysis of "property" in *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972), where the Court reasoned: To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. In applying that standard the Court instructed that property interests are not created by the Constitution, but rather they are "created" and "defined by existing rules or understandings that stem from an independent source such as state law." *Id. See also Arnett v. Kennedy*, 416 U.S. 134, 151-52, 94 S.Ct. 1633, 1643, 40 L.Ed.2d 15 (1974) (plurality opinion); *Goss v. Lopez*, 419 U.S. 565, 574-75, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). The Court suggested two sources that create property interests: state statutes and contracts express or implied between individuals and some agency of the state. 408 U.S. at 577-78, 92 S.Ct. 2694.

> In our view, plaintiff has no contractual or statutory basis for any legitimate claim of entitlement to continued water service. First, plaintiff had no contractual relationship with the Village Water Department. The landlords of her building were the applicants for water service and they were the persons who sought termination of that service. Thus, the express contractual interest in water service was theirs exclusively. In addition, plaintiff makes no claim that a de facto understanding existed between her and the Village. Thus, there is no implied property right. *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).
>
> Second, plaintiff can point to no provision in the state's laws or in the municipal ordinances that purports to provide her with a legitimate claim of entitlement to water service. In fact, the Village's municipal ordinance precludes such a claim. In its preamble, the ordinance does not purport to provide service to all people; instead, it recognizes that "it is necessary that the Village charge the inhabitants thereof for the use thereof and the services supplied." Ord.No. 68 §32. To effectuate this limited provision of service, the ordinance specifies that "(a)ny householder, property owner or other person desiring water or sewer service . . . shall make application therefor . . . ." Id. at §32.1. Thus, the applicable state law only provides a claim of entitlement to those who have made an application for water service. Since plaintiff has neither a contractual nor a statutory basis to support her claim, we conclude that plaintiff was not deprived of a due process right by defendants' termination of her water service." 579 F.2d at 1352-4

This decision in *Sterling* was made by the Seventh Circuit, even though the plaintiff-tenant had the right to apply for an injunction against her landlord under the laws of the State of Illinois. *Woods v. Hadesman*, 37 Ill. App. 607, 86 N.E.2d

583 (1949); *Blue Cross Ass'n v. 666 North Lake Shore Dr.*, 100 Ill. App. 3d 647, 427 N.E.2d 270 (1981).

Thus, since the decision in *Sterling* is "on all fours" with the Ninth Circuit's decision in the case at bar, and because the two decisions are in a direct conflict with one another; and because a writ of certiorari was denied in *Sterling*, this Court needs to accept certiorari in the case at bar to resolve this conflict between the Seventh Circuit and the Ninth Circuit.

The other circuit to have considered the issue of a tenant's right to due process is the Eleventh Circuit in *DiMassimo v. City of Clearwater, et. al*, 805 F.2d 1536 (11th Cir. 1986). The *DiMassimo* decision, although relied upon by the Ninth Circuit in the case at bar, is not "on all fours," because in *DiMassimo*, the Eleventh Circuit found that the tenant-plaintiff did have a property interest in the continued supply of water from the City of Clearwater.

The City of Corvallis has never contended that if a tenant has a property interest in the continued supply of water from a city, then such a tenant is not entitled to due process. Rather, the City of Corvallis, on the basis of the holding in *Sterling*, is contending that when a tenant does not have a property interest in the continued supply of water from a city, the fact that the tenant has the post-deprivation right to apply for an injunction against his landlord does not create a predeprivation property interest entitling the tenant to due process under the Fourteenth Amendment.

2. When a meaningful method of providing due process is not practical, post deprivation remedies are adequate.

a. The right to apply for an injunction, without more, is not meaningful due process. Due process, at a minimum, requires notice, and the opportunity to be heard. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). It goes without saying that notice only would not suffice under the Due Process Clause, because notice without the opportunity to be heard and stop the deprivation is due process without substance, and would be meaningless.

In the case at bar, notice to a tenant to enable him to apply for an injunction is meaningless, and of no value, unless the tenant is likewise given the time to apply for the injunction, and obtain a court order requiring the landlord to pay his bill. The right to apply for an injunction, standing alone, affords the tenant nothing. It is the obtaining of the injunction to force the landlord to pay his bill so that the water will not be turned off that affords the tenant something of substance. That is, the right to apply for an injunction is meaningless without the right for a hearing in court to obtain a court order requiring the landlord to pay his bill.

For example, if a tenant is provided notice that the water is going to be turned off, and he goes looking for an attorney to file for an injunction against the landlord, and the water is turned off before the tenant can find an attorney, then the notice given to the tenant that the water was going to be turned off was of no value to the tenant. The water was shut off. The situation is the same as if no notice was given.

Likewise, if a tenant is provided notice that the water is going to be turned off, and he gets an attorney who files for an injunction, but the water is shut off before the court can hear the case, then, again, the notice given to the tenant that the water was going to be turned off was of no value to the tenant. The water was shut off. The situation is the same as if no notice was given; and worst, since now the tenant has expended the money on an attorney without having the opportunity to prevent the water from being shut off.

The only way that notice to the tenant has any value is in the situation where sufficient time is allowed for the tenant to hire an attorney, for the attorney to file for the injunction, and for the court to hear the merits of the injunction and make a ruling. Then, and only then, has the tenant been given the hearing that is needed to prevent the water from being turned off by having the court issue an order requiring the landlord to pay his water bill.

b. Requiring a city to wait for a court hearing places an overwhelming burden upon the city. Requiring a city to wait for a tenant to obtain an injunction against his landlord, places a financial hardship upon a city; and almost makes it impossible for a city to shut off the water to an apartment complex.

Since a city can not shut off the water until the tenant is afforded due process, during the entire period of time while the city is waiting for the tenant to get his court order, the city must continue to supply free water to the apartment complex. In addition, there is the possibility that the court will not order the injunction, which results in the loss of the water supplied

to the apartment complex. Also, from the standpoint of the city, how much time must it give the tenant to file for the injunction; and how is the city ever to know that an injunction has in fact been filed.

Even if a court orders the landlord to pay the water bill, how long does the city have to wait and continue to supply free water to the apartment complex, before it can shut off the water. Then, if the landlord still does not pay the bill after being ordered to do so by a court, can the city shut off the water, or does the city have to provide both the landlord and tenant another set of notices that the water is going to be shut off for the landlord's failure to comply with the court order; and if so, does the city have to again wait for the tenant to go back to court to get a contempt order against the landlord.

Finally, how much time does the city have to give the tenant to file his injunction, and how much time does the city have to give the court to make a ruling, or is the time line involved completely dependent upon the court's docket.

It is ironic that the end result is that the tenant that does not have a property interest in continued water is afforded more due process then the landlord, who does have a property interest in continued water service. The landlord, who does have a property interest, is only entitled to notice and the right to be heard in front of City Manager; whereas, the tenant, who does not have a property interest in continued water, is entitled to a full judicial hearing against his landlord.

c. There is no meaningful method of providing due process in the case at bar.

The decisions of this Court teach us that in the situation where there is no meaningful method of providing due process, adequate post termination remedies are all the due process required to be afforded. As stated by this Court in *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).

> "The Due Process Clause also encompasses a third type of protection, a guarantee of fair procedure. A §1983 action may be brought for a violation of procedural due process, but here the existence of state remedies is relevant in a special sense. In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*. *Parratt*, 451 U.S., at 537, 101 S.Ct., at 1913; *Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042, 1050, 55 L.Ed.2d 252 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"). The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law." 110 S.Ct. at 983.

The due process that is afforded to a person under the Fourteenth Amendment should not be a hit or miss proposition. An individual that has a right to due process should be advised of his or her right, and afforded the opportunity for a hearing. The situation should not be one in which the person entitled to due process may, or may not get notice because his existence is unknown. If he is entitled to due process, he should get notice.

In the case at bar, it was impossible for proper notice and due process to be afforded to plaintiffs, or any other tenant residing in the apartment building. None of the names of the tenants were known to the City. It was not even known which apartments were occupied, and which apartments were not occupied. Furthermore, it was not known how many people were in each apartment.

Copies of the leases to the apartment complex in this case are not, and were not available to the City. How can there be a requirement to give due process to someone whose name and existence is unknown to the City?

Either a tenant has the right to due process, and thus his name should be known and proper notice be given to him, or he does not have the right to due process. It is the City's position that the notice requirements and hearing requirements of the due process clause should not be left to sloppy and inefficient enforcement. Either a municipality is going to be required to take on an extreme and expensive burden in making sure they know the names of every tenant in every apartment in its City, or no such requirement should be set forth.

If this Court were to hold that a letter addressed to an unknown person in an apartment complex complies with the notice requirements of the due process clause, then in effect, no due process is being provided to the tenants at all. In addition, every water shut off is going to result in a lawsuit, because the tenant is going to contend that he never received the letter, and the City cannot prove otherwise, since it does not even know the tenant's name.

In the case at bar, there simply is no practical way that the City of Corvallis can provide proper notice to tenants not in privity of contract with the City. Furthermore, it is not practical to require the City of Corvallis to supply free water to an apartment complex, while it waits for a court hearing on an injunction filed against the landlord by a tenant. Thus, since there is no meaningful method of providing due process to the plaintiffs in the case at bar, this Court should hold that the plaintiffs' post-deprivation remedies are adequate.

3. The Ninth Circuit misinterpreted this Courts holding in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). In *Logan v. Zimmerman Brush Co., supra*, an Illinois statute barred employment discrimination on the basis of a physical handicap. Logan, a discharged employee, sought to recover damages pursuant to the statute, but was barred from maintaining his claim because a state employee failed to convene a conference between him and his employer within the 120 day time period set forth in the statute. The termination of Logan's claim was complete, and the act of the Illinois State employee had left Logan without any statutory remedy against his employer. Because

Logan was left without a claim against his employer, the Supreme Court held that the State of Illinois had deprived Logan of a constitutionally protected property interest. The precise issue presented to this Court was whether a State may terminate a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure.

In the case at bar, the City of Corvallis did not terminate any cause of action of the plaintiffs; nor did it fail to comply with any statutorily mandated procedures. Under Oregon law, the City had the right to shut off the water.

The law of Oregon provides that a tenant has the right to apply for an injunction under two statutes; namely, ORS 90.360(2) and ORS 90.375. These statutes provide in relevant part as follows:

> "ORS 90.360(2):
>
> Except as provided in ORS 90.100 to 90.940, the tenant may recover damages and obtain injunctive relief for any noncompliance by the landlord with the rental agreement or ORS 90.320." ORS 90.360(2) [Formerly 91.800(2)]
>
> ORS 90.375:
>
> If a landlord . . . willfully diminishes services to the tenant by interrupting or causing the interruption of . . . running water, hot water, . . . the tenant may obtain injunctive relief to recover possession or may terminate the rental agreement . . . ." ORS 90.375

From a reading of the above, under ORS 90.360(2), a tenant may obtain injunctive relief after the landlord shuts off the water, (1) if the landlord agreed in the lease to provide the

water, or (2) the lease agreement was silent as to whose obligation it was to supply the water. Under ORS 90.375, a tenant may obtain injunctive relief to recover possession after the landlord shuts off the water, if the landlord did it willfully. Under both statutes, the right to apply for the injunction arises after the landlord shuts off the water, or causes the water to be shut off.

In the case at bar, the water was shut off. At that point, the tenant had the right to apply for an injunction. The City of Corvallis did nothing to take this right from the plaintiffs, and this right was never extinguished. Thus, since there was no extinguishment of a cause of action, or even a part of a cause of action, by the City of Corvallis, the holding in *Logan v. Zimmerman Brush Co.*, *supra*, does not apply.

CONCLUSION

Absent a property interest in the continued supply of water from a City under state law, a tenant is not entitled to due process under the Fourteenth Amendment by reason of the tenant's post-deprivation right to seek an injunction against his landlord.

Furthermore, even if such right to an injunction did amount to a protected property interest, because there is no meaningful method to provide due process to unknown tenants, and because the delay in time necessary to allow a tenant to obtain a court order to force the landlord to pay the water bill requires the a city to supply free water and prevents a city from being able to shut off the water within a reasonable period of time, the tenant's post-deprivation statutory rights to

seek an injunction and monetary relief from the landlord is all the due process the tenant is entitled.

Respectfully submitted,

_____

Robert E. Franz Jr,
Attorney and Counsel
for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Jennifer C. TURPEN; Donald Lee Thomas, Plaintiffs-Appellees,

v.

CITY OF CORVALLIS, Defendant-Appellant.

No. 92-35207

Argued and Submitted September 1, 1993

Filed June 17, 1994

Appeal from the United States District Court for the District of Oregon, Michael R. Hogan, District Judge, Presiding

Robert E. Franz, Jr., Eugene, Oregon, for the defendant-appellant.

Sara R. Morrissey, Oregon Legal Services Corporation, Albany, Oregon, for the plaintiffs-appellees.

Before: James R. Browning, Mary M. Schroeder, and Cynthia Holcomb Hall, Circuit Judges.

PER CURIAM:

I.

Jennifer Turpen and Donald Thomas (Plaintiffs) brought a § 1983 action against the City of Corvallis, alleging the City's termination without notice of their water service because their landlord failed to pay the water bill violated their right to due process. The parties submitted the case for summary judgment on stipulated facts. The district court held Plaintiffs had no property right to continued water service, but did have a property right in a cause of action for injunctive

relief against the landlord and had been deprived of this property interest without due process by the termination of service without notice. We affirm.

II.

Oregon law requires a landlord to maintain dwelling units in a habitable condition; a dwelling unit is uninhabitable under Oregon law if it "substantially lacks ... [a] water supply." Oregon Landlord and Tenant Act, Or.Rev.Stat. Sec. 90.320(1)(c). Section 90.360(1) of the statute provides the tenant with a cause of action to "recover damages and obtain injunctive relief for any noncompliance ... with ... ORS Sec. 90.320." Relying on the holding in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982), that "a cause of action is a species of property protected by the Fourteenth Amendment," the district court held Plaintiffs' state-law cause of action against their landlord under Sec. 90.320 constituted such a property interest.

A.

[1] The City argues its failure to give notice before cutting off Plaintiffs' water supply did not deprive them of their cause of action under § 90.360 because it did not prevent them from suing for damages or injunctive relief after the services were terminated. Responding to a similar argument in a virtually identical case, the Eleventh Circuit concluded:

> The statutes were clearly drafted not only to allow compensation but to prevent wrongful eviction. Where the City fails to afford the tenant sufficient notice to allow him time to apply for an injunction, it deprives him of his statutory right to prevent a

> wrongful act. The Supreme Court has recognized that "... the cessation of essential services for any appreciable time works a uniquely final deprivation." Memphis Gas, Light & Water Div. v. Craft, 436 U.S. 1, 20, 98 S.Ct. 1554, 1566, 56 L.Ed.2d 30 (1978). That is especially true where the landlord's request for the cessation of those services violates a tenant's right to continuous occupation and quiet enjoyment of his leasehold.

DiMassimo v. City of Clearwater, 805 F.2d 1536, 1540 (11th Cir. 1986).

We agree that the tenant's right to seek injunctive relief prior to the termination of water service is separate from the right to seek damages or abatement. Use of the premises without interruption of water services can be secured only by an action for injunctive relief before that interruption occurs.

The City argues *DiMassimo* is inapposite because the tenants in *DiMassimo* could not contract directly with the city, whereas the tenants in this case could; the landlord in *DiMassimo* asked the City to discontinue the water service, whereas the landlord in this case merely failed to pay the bill; and *DiMassimo* held the tenant had a property right to continuous water service in addition to the property right to bring a suit against the landlord for injunctive relief, whereas the tenants in this case have not established the existence of such a right. None of these distinctions is relevant to whether the City's termination of water service without notice extinguishes the tenants' right to seek pre-termination injunctive relief without due process.

B.

[2] The City argues a pre-termination notice requirement would be unduly burdensome. Whether notice is practicable under the circumstances is relevant to what process is due in a particular case, not to whether a due process right exists. Where, as here, the City has full knowledge of the addresses at which it intends to terminate water service, providing pre-termination notice at those addresses (which is all Plaintiffs are seeking) is not impracticable. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313-14, 70 S.Ct. 652, 656-57, 94 L.Ed. 865 (1950).

The City's reliance on *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (statutory damages action sufficient to satisfy due process), is misplaced. Pre-termination notice to the Plaintiffs was not impossible, as it was in *Parratt*, and the City's termination of the water service was not a "random and unauthorized act," but rather occurred pursuant to "established state procedure." *Logan*, 455 U.S. at 436, 102 S.Ct. at 1158.

III.

[3] Plaintiffs argue the district court erred in determining they had no property right to continuous water service from the City. They offer this argument not simply as an alternative ground supporting the summary judgment in their favor, but rather as a ground for modifying the judgment to expand their rights and their entitlement to damages for the violation of those rights. Since Plaintiffs did not file a cross-appeal, we decline to address the question. *Engleson v. Burlington Northern Ry. Co.*, 972 F.2d 1038, 1041 (9th Cir. 1992)

("Generally, a cross-appeal is required to support modification of the judgment, but ... arguments that support the judgment as entered can be made without a cross-appeal." (citations and internal quotations omitted)). *See also Housing Auth. v. Ponca City*, 952 F.2d 1183, 1195 (10th Cir. 1991) ("An appellee may present an argument on appeal only if it does not enlarge the rights conferred by the original judgment."); *Texas Commerce Bank Nat. Ass'n v. National Royalty Corp.*, 799 F.2d 1081, 1083 (5th Cir. 1986) (Appellee who failed to file cross-appeal could not attack judgment with view toward enlarging rights.).

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JENNIFER C. TURPEN, and DONALD LEE THOMAS,	)	Civil No. 91-6085-JO
Plaintiffs,	)	OPINION & ORDER
v.	)	
CITY OF CORVALLIS,	)	
Defendant.	)	

JONES, Judge:

Plaintiffs, Jennifer Turpen and Donald Thomas, bring this complaint against the City of Corvallis, ("City") under 42 U.S.C. § 1983. The court has jurisdiction under 28 U.S.C. § 1343.

The basis of plaintiffs' complaint is that

> [o]n two separate occasions, . . . the City of Corvallis, without warning, shut off the water service to the multi-unit apartment building where they live. Under the City's water termination policy, tenants can lose water service without any prior notice whatsoever simply because their landlords have not paid the water bill.

Complaint (#4), p. 1. Plaintiffs submit that the City's failure to give notice of water service termination violates the Due Process Clause of the Fourteenth Amendment.

According to plaintiffs' complaint, their landlord was responsible for the payment of plaintiffs' water bill. On April

5, 1990 and on October 31, 1990, the City disconnected plaintiffs' water service without notice to plaintiffs.

> Plaintiffs had and continue to have property rights arising under state law, the Corvallis City Ordinances, their rental agreement, and the Oregon Residential Landlord and Tenant Act which entitled them to uninterrupted water service and the right to enforce their statutory rights as tenants in state court to prevent a water shut off.

Complaint (#4), p. 4. The official policy of the City is to notify the subscriber of the water service of water service disconnections.[1]

Plaintiffs move for summary judgment (#11) and the City moves for summary judgment (#15). The parties agree that this case is perfect for summary judgment disposition because the facts are not in dispute.

To state a claim under 42 U.S.C. § 1983, plaintiffs must allege that defendants, who were acting under color of state law, deprived plaintiffs of rights secured by the Constitution or federal statutes. Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 624 (9th Cir. 1988) (citations omitted). "A person acts under color of state law, if he 'exercise[s] power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" Vang v. Toyed, No. 90-35254, slip op. at

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[1] Although plaintiffs contend that the policy to notify only the subscribers, as opposed to the users, is codified in Ordinance No. 58-65, neither plaintiffs nor the City provide the court with a copy of the ordinance.

12378 (9th Cir. Sept. 5, 1991) (citations omitted). The City admits that it was acting under color of state law.

The court now turns to the central issue: did plaintiffs enjoy a constitutionally protected property interest?

> Constitutionally protected property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." [Board of Regents v.] Roth, 408 U.S. at 577 . . . . "[Alt]hough state law creates a property interest, not all state-created rights rise to the level of a constitutionally protected interest." Brady v. Gebbie, 859 F.2d 1543 n. 3 (9th Cir. 1988)., cert denied, 489 U.S. 1100 . . . (1989). The question whether a state-created right triggers constitutional protections is a question of federal constitutional law. Id.

Wheaton v. Webb-Petett, 931 F.2d 613, 615-16 (9th Cir. 1991).

1. Cause of Action

Plaintiffs submit that they have a property interest because of their state court right to enjoin a landlord from disconnecting their water service. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment.").

Plaintiffs cite to "a virtually identical" case for support, although recognizing that the case is not binding on this court. In DiMassimo v. City of Clearwater, 805 F.2d 1536 (11th Cir. 1986), tenants brought suit against the City of Clearwater, which provided utilities to customers. An ordinance of the City of Clearwater provided that the only

customers who may receive utilities are "owners whose land receives the benefit of those services or persons who have the owner's authority to request that utilities be provided . . . and agree that the owner shall be responsible for the payment of charges." DiMassimo, 805 F.2d at 1537.

The City terminated the utility service to the tenants, at the request of the landlord, without notice to the tenants. The tenants' attempts to reconnect the utility service were frustrated because the tenants were neither landowners nor could they obtain the landlords acknowledgment of responsibility for payment.

The district court, which was affirmed by the Eleventh Circuit, found Florida's landlord-tenant law to create a legitimate claim of entitlement, a property interest, in the right to apply for an injunction. Pretermination notice was necessary to prevent the City from destroying rights granted to the tenants by state law; the right to apply for an injunction.

Oregon has a landlord-tenant act that provides plaintiffs, such as plaintiffs in the present case, with a cause of action against landlords who disrupt the tenants' water supply.[1] "A landlord shall at all times during the tenancy maintain the dwelling unit in a habitable condition." ORS 90.320(1). A dwelling unit is uninhabitable if the unit "substantially lacks" a water supply. Id. "[T]he tenant may recover damages and

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[1] At oral argument, the City made an argument regarding adequate postdeprivation state remedies. The existence of adequate postdeprivation state remedies, such as the landlord-tenant act, does not satisfy due process because the property interest was taken away pursuant to an established procedure. See Hudson v. Palmer, 468 U.S. 517, 534 (1984); Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982).

obtain injunctive relief for any noncompliance by the landlord with the rental agreement or" if the landlord fails to keep the dwelling unit in a habitable condition. ORS 90.360(2) (emphasis added).[1] The plaintiffs in the present case had a right to apply for an injunction for two reasons: 1) the premises became uninhabitable because the premises substantially lacked a water supply in good working order to the extent controlled by the landlord; and 2) the landlord was not complying with the rental agreement.

A further remedy in the Oregon landlord-tenant act is found at ORS 90.375.

> If a landlord . . . wilfully diminishes services to the tenant by interrupting or causing the interruption of . . . running water . . . the tenant may obtain injunctive relief to recover possession or may terminate the rental agreement and recover an amount up to two months' periodic rent or twice the actual damages sustained by the tenant, whichever is greater.

ORS 90.375.[2]

"The City's failure to notify plaintiffs of the water shut off deprived them of their right of . . . apply for injunctive relief in state court under . . . ORS 90.360(2)," Plaintiff's Memorandum in Support (#12), p. 5, leaving them with a subsequent suit for damages, a position flatly rejected in DiMassimo.

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[1] The rental agreement provides that the landlord shall pay for the water.

[2] ORS 90.375 does not provide for broad injunctive relief, but merely for injunctive relief to recover possession for those tenants "unlawfully remove[d] or exculde[d] . . . form the premises." ORS 90.375 Therefore, plaintiffs did not enjoy a right to proceed under ORS 90.375 for injunctive relief.

> The statutes were clearly drafted not only to allow compensation but to prevent wrongful eviction. Where the City fails to afford the tenant sufficient notice to allow him time to apply for an injunction, it deprives him of his statutory right to prevent a wrongful act.

DiMassimo, 805 F.2d at 1540. Plaintiffs correctly submit that they have a due process right to seek an injunction under ORS 90.360(2).

There are two plaintiffs in this action: Jennifer Turpen and Donald Thomas. Only Donald Thomas signed the lease, however, Jennifer Turpen is listed on the rental agreement as a tenant. Under the definition of "tenant" Donald Thomas and Jennifer Turpen are tenants. ORS 90.100(13) ("'Tenant'" means a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of other . . . ."). Both are entitled to exercise the rights described above. Both possess a due process right under ORS 90.360(2) ("[T]he tenant may recover damages and obtain injunctive relief . . . .").

2. Entitlement to Continued Supply of Water.

Plaintiffs submit that Oregon law provides them with a property interest in the continued supply of water. See Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (holding that because Tennessee law does not permit a public utility to terminate services "at will," plaintiffs asserted a legitimate claim of entitlement protected by the Fourteenth Amendment).

According to plaintiffs,

> [t]he requirement that utilities operate with reasonable rules and regulations [see Kampstra v. Salem Heights Water Dist., 237 Or. 336, 391

> P.2d 641 (1964); Oliver v. Hyle, 14 Or. App. 302, 513 P.2d 806 (1973) combined with the recognition that water is a necessity of life, presupposes that the person most deserving of due process protection is the actual user of the water, not necessarily the person who pays the bill.

Plaintiffs' Memorandum in Support (#12), p. 10.

What plaintiffs fail to include is Oregon law supporting this argument. In Memphis Light, Gas & Water, the Court was able to quote directly from state law that gave rise to the plaintiffs' entitlement. See Coghland v. Starkey, 845 F.2d 566, 569-70 (5th Cir. 1988) (discussing statutory, regulatory, policy statement or contractual basis for property interest).

While the court agrees that Sterling v. Village of Maywood, 579 F.2d 1350 (7th Cir. 1978), cert. denied, 440 U.S. 913 (1979) is distinguishable, the distinction reveals the problems with plaintiffs' second argument in favor of a property interest.

> Three district courts have held that a water user has a legitimate entitlement to continued water service when that service is terminated due to arrearages in the landlord's bill See Davis v. Weir, 328 F. Supp. 317 (N.D. Ga. 1971); Koger v. Guarino, 412 F. Supp. 1375 (E.D. Pa. 1976[;] and Lamb v. Hamblin, 57 F.R.D. 58 (D. Minn. 1972). With all due respect to those courts, we find their reasoning unpersuasive as applied in this case. In Koger, the court merely stated than an interest existed without explaining the basis for entitlement. . . . In both of the other decisions, the courts attached dispositive significance to the importance of water as "an absolute necessity of life." . . . That analysis, however, is irrelevant to the question of whether there is an entitlement. As the Supreme Court

> has made clear, it is the nature, and not the weight of importance, of the plaintiff's interest that determines whether a property interest exists.

Sterling, 579 F.2d at 1354, 55 (footnote omitted).[1]

Without offering a copy of the Ordinance No. 58-65, plaintiffs discuss the ordinance, proffering that the Ordinance created a legitimate claim of entitlement. Interestingly enough, from what is quoted to the court, the ordinance does not provide that termination shall be only "for cause." See Memphis Light, Gas & Water, supra. The ordinance, as quoted by plaintiffs, merely provides for "reasonable diligence and care to deliver a continuous and sufficient supply of water to the customer . . . avoid[ing] any shortage or interruption." Plaintiffs' Memorandum in Support (#12), p. 15.

According to plaintiffs, "'customer' is defined as '[a] person receiving water service from the utility.'" Id. Regardless of the definition of "customer," this ordinance does not provide plaintiffs with an entitlement, but a mere

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[1] The footnote omitted provides that

> [w]e should make clear that although we have found analysis on entitlement presented in the three district court opinions to be unpersuasive, we in no way mean to suggest that those cases were wrongly decided on the merits. The issue of what rights a tenant has when the municipality terminates water because the landlord has failed to pay the water bill is not before us. Plaintiff does not allege that the Village terminated her water service because of the landlord's failure to pay for the water service.

Sterling, 579 F.2d at 1355 n. 12. Rather, plaintiff alleged that the Village failed to reinstate her water her water service because her landlord failed to pay the past due water bill. The Seventh Circuit reversed the dismissal of the plaintiff's complaint stating "a refusal to reinstate water service because the landlord has failed to pay the water bill is a violation of the tenant's right to equal protection." Sterling, 579 F.2d at 1355.

expectation. See Memphis Light, Gas & Water, supra; Sterling, 579 F.2d at 1355-56 (discussing mandatory language of water service ordinance; for example; use of the word "shall").

Nothing proffered by plaintiffs demonstrates a broad entitlement to a continued water supply. However, the Oregon landlord-tenant act provides remedies and rights that give plaintiffs an entitlement to apply for an injunctive to prevent the termination or disruption of water service.[1]

3. City's Arguments

The City's reliance upon the concept of privity of contract is misplaced and contrary to established law.

> All municipalities have the names and addresses of those in privity of contact with it, so that notices can be sent to the subscriber with certainty that the subscriber will receive such notices. There is no guess work involved, nor is there the wasted time and expense of serving notices on unoccupied apartments.

Defendant's Legal Memorandum (#15), p. 17.

Neither Sterling, nor Memphis Light, Gas & Water rested upon the concept of privity, as the City would have this court

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[1] The court further notes plaintiffs proffer of OAR 860-21-326. Since plaintiffs fail to proffer a copy to the court, the court is unable to determine the validity of the plaintiffs' argument.

The parties discuss various Oregon statutes. See ORS 264.306; ORS 757.760; and ORS Chapter 225. The court does not reach the issue whether these statutes provide plaintiffs with a property interest in continued water service because the court has already decided that plaintiffs have a property interest by virtue of the rights created in the landlord-tenant act and because the plaintiff do not seriously argue that these statutes provide a property interest.

believe. Sterling, 579 F.2d at 1353 (The Court has suggested two sources that create property interest: state statutes and contracts--express or implied--between individuals and some agency of the state.") (footnotes omitted).

The essence of this case is not that

> because Mr. Heilesen was obligated to supply and pay for water, they [the plaintiffs] had a legal entitled to water from the State of Oregon which in turn gave them a property interest in continued water service, which then obligated the City of Corvallis to provide them notice before terminating the water to their apartment.

Defendant's Legal Memorandum (#15), p. 18. The essence of this case is that because a state statute provides that landlords must provide a water supply or be faced with an injunction, a protected interest, no entity may take away a tenant's legal right and entitlement to get an injunction prohibiting the landlord from taking away the tenant's water supply. Simply, leaving the tenant with the option to, after the fact, receive compensation is not enough.

The fact that the landlord, Mr. Heilesen, contracted to pay for plaintiffs' water is not dispositive. See ORS 90.320(1)(c)(A)-(D) (detailing various ways water supply may run counter to the landlord-tenant act).

It is not the deprivation of water itself that gives rise to this action, it is the deprivation of plaintiffs' statutory right to get an injunction. To assail the City's unreasonable fears, a simple way to notify persons of impending water termination is a note on the door or a mailing addressed to the resident.

SUPREME COURT, U.S.
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No. 94-446

In The
Supreme Court of the United States
October Term, 1994

CITY OF CORVALLIS,

Petitioner

v.

JENNIFER C. TURPEN and
DONALD LEE THOMAS,

Respondents.

On Petition for Certiorari
To The United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION

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13 pp

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QUESTION PRESENTED

Whether a tenant's right under state landlord-tenant law to seek an injunction against a landlord who failed to pay for water service constitutes a constitutionally protected "property interest" under the due process clause of the fourteenth amendment when a city destroys the tenant's ability to pursue the injunctive action by terminating the tenant's water service without prior notification.

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BRIEF IN OPPOSITION

Respondents Jennifer C. Turpen and Donald Lee Thomas respectfully request that this Court deny the Writ of Certiorari sought by Petitioner City of Corvallis.

I.

STATEMENT OF THE CASE

The City of Corvallis disconnected water service to Jennifer Turpen and Donald Thomas (the "Tenants") twice

in 1990 without giving them prior notice. The City turned off the water because the landlord failed to pay the bill. The City's official policy was to notify only the bill payor without providing any notice to the residence where water service would be disconnected.

The Tenants raised two constitutional theories to the federal district court in a 42 USC § 1983 action: 1) the Tenants had a property interest under the due process clause in the form of a cause of action against their landlord for injunctive relief under state landlord-tenant law; and 2) the Tenants had a property interest in their entitlement to continued water service. The District Court ruled in favor of the Tenants on the first argument and rejected the second argument. On appeal, the Tenants raised both arguments again. The Ninth Circuit affirmed the District Court's ruling regarding the first argument, and refused to rule regarding the second argument, holding that the issue was not properly before them because the Tenants failed to file a cross appeal.

In its Petition for Writ of Certiorari, pages 4-6, the City outlines a series of facts which are neither relevant nor established in the record. The Tenants never stipulated to the correctness of any facts contained in the Affidavit of Mark Larson, cited at length by the City.

This laborious recitation of misleading and immaterial facts is grounds alone to deny the City's petition under Supreme Court Rule 14 .5.

II.

ARGUMENT

REASONS FOR DENYING WRIT

A. Supreme Court Review Of This Case Is Inappropriate As There Is No Conflict Among The Circuits.

There are only two circuits that have considered the question presented: the Ninth and the Eleventh. In the instant case, the Ninth Circuit relied extensively on the Eleventh Circuit's decision of DiMassimo v. City of Clearwater, 805 F.2d 1536 (11th Cir. 1986). In fact, the court stated that DiMassimo is a "virtually identical case." Turpen v. City of Corvallis, 26 F.3d 978, 979 (9th Cir. 1994). Contrary to the City's assertions, Sterling v. Village of Maywood, 579 F.2d 1350 (7th Cir. 1978) is inapposite. In that case, the Seventh Circuit did not even discuss whether a tenant's state law cause of action against a landlord is a constitutionally protected property interest. In Sterling, the tenants only argued that they had a

property interest in continued water service (an argument the district court likewise rejected in this case). Accordingly, the Seventh Circuit expressed no opinion regarding the issue ruled upon by the Ninth Circuit. To argue that Sterling and this case are "on all fours" and "in direct conflict" is a reckless misstatement of law.

As there have been no inconsistent court rulings on the issue presented, and the issue is uncomplicated and rarely litigated, there is no need for Supreme Court guidance in this area of law.

B. Neither The Decision Below Nor The Record Raises The Questions Presented In The Petition.

All five of the questions presented by the City rely on misstatements of law or fact and attempt to present legal arguments that were not raised at the Ninth Circuit. Because the questions presented by the City rely on arguments that were not considered below, they cannot properly be raised before this Court. Delta Airlines v. August, 450 U.S. 346, 362 (1981). For this reason alone, the Court should deny the writ.

i. The City never argued below that the tenants' right to sue for an injunction arises only after the water has been shut off.

Underlying questions 1-4 of the Petition is the City's assertion that under Oregon law, a tenant can bring an injunction only after the landlord has disconnected the water service. The City's attempt to distinguish Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (pages 23-25 of the Petition) is also based on this misstatement of law. The City never argued this position below and in fact took the opposite stance in its Ninth Circuit brief, where at page 15, it stated, ". . .it is clear that the right to obtain an injunction exists both before and after the alleged violation of the rental agreement or ORS 90.320."

Further, a plain reading of Oregon law shows the City's argument to be specious. Under Oregon law, a landlord is required to maintain a dwelling in a habitable condition "at all times" during the tenancy. Oregon Landlord and Tenant Act, Or.Rev.Stat. § 90.320(1). The City does not dispute that failure to supply water violates this statute. The Ninth Circuit correctly held in this case that "[u]se of the premises without interruption of water services can be secured only by an action for injunctive

relief before that interruption occurs." 26 F.3d at 979 (emphasis added).

ii. The City never argued below that due process would require the City to delay terminating water service until after the Tenants received state court relief.

In question 5 and section 2. of its Petition, the City presents another novel departure from its previous arguments. The City attempts, for the first time, to portray the due process required in this case as not only notice, but also, time for the Tenants to hire an attorney and to have a hearing in state court on their claim for an injunction. There has never been the slightest suggestion by either party during the course of this litigation that the City would have to wait until the Tenants had their day in court before shutting off water service. All the Tenants are asking for in this case is that they receive prior notice of a scheduled water shut off.

The City's argument fails not only because it was not presented below, but more importantly, because it is irrelevant to this case. As stated by the Ninth Circuit in its decision, the issue presented before the Court is whether a due process right exists, not what process is due.

Even if we were to assume that the level of due process were relevant, the City's argument outlined in pages 18-20 of its Petition is so far afield that it borders on the ridiculous.

The City asserts that notice alone would have been meaningless to the Tenants because the water service may have been terminated anyway before the Tenants received state court relief. With prior warning, the Tenants not only could have sought legal assistance, but in addition, they could have taken steps to prepare for the shut offs, such as securing alternative living arrangements or stockpiling water. Even if ultimately they had been unsuccessful in getting the landlord to pay the water bill before the shut offs occurred, they still would have had time to prepare for the shut offs and would have received the opportunity to seek relief in state court. As such, to claim that prior notice of a shut off is "meaningless" unless a tenant also achieves state court relief is nonsense.

In sum, this Court should deny the writ because all of the questions presented by the City rely on arguments that were not raised before the Ninth Circuit. As such, they cannot properly be raised before this Court.

C. The Ninth Circuit Correctly Held That Post-Deprivation Remedies Are Inadequate In This Case.

The City asserts that "there simply is no practical way that the City of Corvallis can provide proper notice to tenants" unless the City takes on the "extreme and expensive burden" of finding out the names of all tenants. The City claims that a notice addressed to "occupant" would provide no due process "at all," and therefore under Parratt v. Taylor, 451 U.S. 527 (1981), post-deprivation remedies are sufficient.

Both the District Court and the Ninth Circuit flatly rejected this argument. First, under Parratt, post-deprivation remedies are only adequate when the deprivation results from a "random and unauthorized" act. In the case at bar, of course, failing to notify the Tenants was not a "random and unauthorized" act, but instead was the result of the City's official policy. Second, the City can simply provide a door-hanger notice and send a letter addressed to "occupant" to the service address to fulfill its due process obligations. These notices can be accomplished without knowing the names of the occupants and without much administrative burden or expense.

The national impact of letting the Ninth Circuit

Court of Appeals' decision stand on the question presented is to protect the rights of those facing unexpected and potentially health-threatening water shut offs at very little administrative burden and expense to the municipalities.

III.

CONCLUSION

The Ninth Circuit's decision is neither novel nor unusual. It is completely consistent with the only other reported decision on the same issue and is merely a straightforward application of Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). There is no need for Supreme Court guidance in this area of law, and in fact it would be improper for the Court to accept review because all of the questions framed by the City rely on arguments that were not considered below. The Petition for Certiorari should be denied.

DATED: September 29, 1994

Respectfully submitted,

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